NO. 85-127

In the
Supreme Court of the United States
October Term, 1985

LAMAR ALEXANDER,
Governor of the State of Tennessee, et al.,

Petitioners,

v.

ROSIER JENNINGS, et al.,

Respondents.

ON A PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Gordon Bonnyman
Counsel for Respondent

Susan Garner
Attorney

Legal Services of Middle
Tennessee, Inc.
1512 Parkway Towers
404 James Robertson Parkway
Nashville, TN 37219
Phone: (615) 244-6610

Brian Paddock
Attorney

Rural Legal Services of
Tennessee, Inc.
Arcade Building, Courthouse Square
Cookeville, TN 38501
Phone: (615) 528-7436

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QUESTIONS PRESENTED

1. Is a "disparate impact, or "effects" test appropriate to determine a violation of Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. §794) and regulations promulgated thereunder?

2. In the alternative, weighing all of the evidence of record, does such evidence establish that Tennessee's reduction of in-patient hospital coverage under its federally assisted Medicaid program has a disparate impact on the handicapped so as to establish a prima facie violation of Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. §794) and regulations promulgated thereunder?

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OPINIONS BELOW

Since the printing of the Petition for a Writ of Certiorari, the August 4, 1983 opinion of the Sixth Circuit Court of Appeals has been published at 715 F.2d 1036. As noted in the Petition, the District Court decision is published at 518 F.Supp. 877. The text of both decisions were reproduced in the appendix to the Petition.

STATEMENT OF THE CASE

This case involves the legality of Tennessee's cutback in Medicaid coverage for hospital services to indigent handicapped patients. Although approximately 70% of the funds for the Medicaid program are provided by the federal government, Tennessee administers the program and defines the scope of eligibility and coverage within limits prescribed by Title XIX of the Social Security Act, 42 U.S.C. §1396a et seq., and other applicable federal laws and regulations. Title XIX specifically requires the State to provide in-patient hospitalization to patients covered by its Medicaid program. 42 U.S.C. §1396a(a)(13).

In August, 1980, in an effort to reduce its Medicaid expenditures, the State proposed sweeping cutbacks in services covered by the program. Tennessee Medicaid patients filed the present action on August 14, 1980 challenging on procedural and substantive grounds the legality of several of the specific reductions. By the time the District Court reached a final decision on the merits on June 17, 1981, all but one of these challenges had been settled.

The remaining issue, which is now before this Court, involves a reduction in the number of days of annual hospital coverage from 20 to 14. While conceding the broad latitude enjoyed by the State in reducing the coverage of the Medicaid program, plaintiffs [respondents here] challenged the particular method chosen by defendant state officials [petitioners here]. The reduction in in-patient hospital coverage was challenged inter alia, because of its sharply discriminatory impact on the handicapped. At issue is whether such discrimination is prohibited by Section 504 of the Rehabilitation Act of 1973 and accompanying regulations, which prohibit discrimination against the handicapped in federally assisted activities. 29 U.S.C. §794; 45 C.F.R. §84.

At trial, the evidence established without contradiction that Tennessee's handicapped Medicaid patients, who are by definition destitute, have extremely limited access to needed hospital care in the absence of available Medicaid coverage. It was also proven without dispute that the effect of the State's reduction in hospital coverage would be to limit Medicaid patients' access to hospital services. This effect would be felt most heavily by the handicapped. Indeed, undisputed statistics showed that handicapped patients would be nearly four times as likely as non-handicapped patients to be denied hospital care as a result of the cutback. 518 F.Supp. 877, at 881; Petition for a Writ of Certiorari, Appendix [hereafter "P.A."] at A-32.

State officials admitted that they had not given any thought to the impact of the cutback on the handicapped or any other group of Medicaid patients. They were concerned instead with meeting the objections of the hospital industry, which had protested their original plan to realize the necessary cost savings by the adoption of tightened hospital reimbursement policies. These reimbursement restrictions, although consistent with Title XIX, would have required the prior approval of the Secretary of Health, Education and Welfare. That factor, and a desire to be responsive to hospital industry objections, were the only considerations or alternatives taken into account when state officials hastily settled upon the reduction in hospital coverage. 715 F.2d at 1044; P.A. at A-14.

Plaintiffs presented further evidence that an alternative method of calculating hospital benefits was available which would achieve the same cost-savings without as great an impact on handicapped patients' access to medical care.[1/]

[1/] Although it is of no analytical significance, in order to avoid any confusion it should be noted that the Sixth Circuit opinion mistates the alternative proposed by the plaintiffs. The Court of Appeals refers to the alternative under consideration as a limit on the total number of hospital visits per year, rather than on the number of days of in-patient coverage. 715 F.2d at 1044; P.A. at A-13. Actually, the alternative which was the subject of plaintiffs' proof in the trial court would limit the number of days of hospital coverage on a per-stay basis, without any limit on the number of stays per year. See 518 F.Supp. at 883 n.7; P.A. at A-36 n.7.

The District Court concluded that there had not been sufficient evidence to support a finding of disparate impact on the handicapped. 518 F.Supp. 877 (M.D.Tenn., 1980); P.A. at A-27. The trial court concluded further that, even if the evidence were deemed sufficient to establish a disparate impact, such discrimination is not of the type proscribed by Section 504.

On August 4, 1983, ruling on an appeal brought by the plaintiffs, the Sixth Circuit Court of Appeals vacated and remanded the case for further proceedings. 715 F.2d 1036; P.A. at A-1. The appellate court emphasized the broad latitude enjoyed by the State in fashioning the coverage of its Medicaid program. The Circuit Court rejected plaintiffs' procedural objections to the cutback, as well as their substantive argument that the method selected violated the State's duty under 42 U.S.C. §1391a(a)(19) to administer the program in "the best interests of recipients". The Court of Appeals concluded, however, that the plaintiffs had indeed succeeded in proving the cutback's disparate impact on handicapped patients' access to hospital care. The opinion noted that even the defendants had conceded as much in their brief before that court. 715 F.2d at 1042 n.7; P.A. at A-11 n.7. This showing was held sufficient to establish a prima facie case under Section 504. The case was then remanded to afford the defendants another opportunity to offer a substantial justification for their actions.

One member of the Sixth Circuit panel, Judge Merritt, dissented from the remand decision. Relying in part on analogous cases under Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d et seq., he expressed doubt as to whether a "disparate impact" test is the appropriate measure by which to assess compliance with Section 504. 715 F.2d at 1049; P.A. at A-25. The dissenting opinion also asserted that the majority based its finding of discrimination on the State's failure to engage in

"affirmative action" necessary to afford handicapped patients "equality of results", rather than mere equality of access. 715 F.2d at 1048; P.A. at A-23-24.

The majority countered that criticism by pointing out that it had made no "finding of discrimination" whatever, much less a finding based on an application of an "affirmative action" test. The majority reiterated that all it had decided was what elements of proof are sufficient to establish a prima facie case, thereby triggering a further inquiry by the trial court. Expressly disavowing any intimation of its view regarding the ultimate outcome of the litigation, the panel remanded the case to the District Court for further proceedings. 715 F.2d at 1046 n.12; P.A. at A-19. There, the majority emphasized, defendants may yet defeat the plaintiffs' claim by establishing that their actions were substantially justified notwithstanding the concededly disparate impact of these actions upon the handicapped. 715 F.2d at 1044-1045; P.A. at A-15-16.

Defendants have petitioned this Court for certiorari to review the decision of the Sixth Circuit to remand the case to the trial court for further development of the record and final disposition.

REASONS FOR DENYING THE WRIT

This case is not in a proper posture for review by the Supreme Court. The petition for certiorari is premature. The petition also represents an inappropriate effort to litigate in this Court issues which were either conceded or simply not raised at all in the lower court.

Even if the case were in a posture appropriate for review, neither of the questions raised in the petition would warrant consideration by this Court.

A. This case is not ripe for review by this Court.

This case is not ripe for review in its present posture. The lower courts have yet to make their decision on the merits of the case, nor have they even finished developing the record necessary to reach such a determination. In the absence of such a record, the Sixth Circuit has explicitly refused to intimate any view regarding the proper or probable outcome of the lawsuit. 715 F.2d at 1046 n. 12; P.A. at A-19 n.12. It is noteworthy that all but one of the numerous issues which were initially litigated were mooted out or settled as the case moved through the District Court. One such issue was settled after it had been tried and submitted to the trial judge. 715 F.2d at 1039-1040; P.A. at A-2, A-3. That experience attests to the prudence of withholding premature review of what is yet an undeveloped issue.

B. The petition for certiorari raises issues which petitioners either conceded or simply failed to raise at all in the lower courts.

Neither of the questions presented for review was squarely addressed in the lower courts. From the outset of the litigation, the state conceded as a factual matter the existence of a disparate impact. In neither the trial nor

appellate court did the state question the validity of the disparate impact test or the federal regulations mandating the application of such a test. Prior to seeking review from this Court the petitioners limited themselves simply to arguing that, as a matter of regulatory and statutory construction, the type of disparate impact which they conceded to be present did not fall within the "disparate impact" standard to be applied under Section 504.

In a startling reversal of field, the petitioners now challenge for the first time the "disparate impact" standard itself and, by implication, the federal regulations which prescribe that standard. 45 C.F.R. §84.4; P.A. at A-55 - A-57. Were certiorari to be granted on that question, this Court would be forced to review a question which had not been briefed, argued or directly addressed in either of the courts below.

As their second issue for review, petitioners question whether the facts in this case demonstrate a disparate impact on the handicapped. The petitioners explicitly conceded this issue below. In the district court, the state's own expert witness, a biostatistician, concluded that handicapped patients utilized the inpatient hospital services at issue "at a much higher level than the non-handicapped Medicaid recipients." Court of Appeals Joint Appendix, p. JA-207. In the face of that and other overwhelming evidence, the petitioners conceded below the factual issues they would resurrect here. In their brief before the Sixth Circuit, petitioners stated candidly:

> "The statistics and studies were computed and analyzed by the parties in several different ways during the course of the trial. Suffice it to say, the studies indicated that the handicapped population of Medicaid recipients would suffer proportionately more from the reduction in hospital benefits than the non-handicapped Medicaid recipients."
>
> 715 F.2d at 1042 n.7; P.A. at A-11 n.7.

C. In any event, the questions presented in the petition for certiorari do not warrant consideration by this Court.

1. This Court should not be used for the litigation of factual issues.

Petitioners' question as to whether the evidence establishes disparate impact raises an issue of fact. This Court should not be used for the relitigation of factual issues. The use of this forum for that purpose is particularly inappropriate where, as in the present case, the factual issue raised by the petitioners was conceded by them in the lower courts.

2. The Court of Appeals' legal ruling creates no conflict with the decisions of other Circuits or this Court.

The petitioners seek review of a Sixth Circuit legal ruling which quite simply does not exist. The petitioners contend that the Court of Appeals found a violation of Section 504, when in fact that court only found that the plaintiffs had made out a prima facie case, thus necessitating a remand for further proceedings in the trial court. Petitioners therefore mistakenly equate the elements of a prima facie case with the elements of a final finding of illegal discrimination. Hence petitioners' assertion that the Sixth Circuit has mandated "affirmative action" or "equality of results" under Section 504.

The Sixth Circuit itself renounces the construction imputed to its decision by the petitioners, emphasizing that it has dealt only with the elements of a prima facie case, and nothing more. 715 F.2d at 1046 n.12; P.A. at A-19 n.12. Indeed, the Sixth Circuit explicitly countenances a finding of nonviolation of Section 504 even in situations where there is a striking disparity of access. The Court of Appeals does so by allowing petitioners an opportunity to show that their apparently discriminatory actions are nonetheless substantially justified and, therefore, lawful.

The petitioners attempt to infer from their mistaken reading of the Sixth Circuit decision a conflict with the decisions of other Circuits and this Court. The petitioners are unable to cite any decisions from other Circuits which squarely conflict with the Sixth Circuit's ruling. They contend, however, that the ruling is unprecendented, so much so that it is described as opening the courts to a whole new type of litigation.

Read as it is written, rather than as petitioners describe it, the Sixth Circuit ruling is neither unprecedented nor broad. The disparate impact test which the Sixth Circuit applies is established in the federal regulations promulgated by the Secretary of Health and Human Services. 45 C.F.R. §84.4; P.A. at A-55. It has been applied by other Circuits. NAACP v. The Medical Center, Inc., 657 F.2d 1322 (3rd Cir., 1981)(en banc); Prewitt v. United States Postal Service, 662 F.2d 292 (5th Cir., Unit A, 1981). Petitioners have cited no cases, and there are no cases of which respondents are aware, in which any other Court of Appeals has declared the regulations invalid or refused to apply the tests which they embody. The other Circuits have no quarrel with the Sixth Circuit's ruling on the elements of a prima facie case under Section 504.

Neither is there any conflict between the Sixth Circuit's ruling and the decisions of this Court. Indeed, the petitioners' attack on the "disparate impact" test under the Section 504 regulations amounts to a plea that this Court reconsider its decision in Guardians Association v. Civil Service Commission of New York, U.S. , 103 S.Ct. 3221, L.Ed.2d (1983). Whatever the broader implications or applicability of Guardians to Section 504 litigation, at a minimum it supports the decision of the Sixth Circuit in this case. The Sixth Circuit, following the lead of the other Circuits cited above, has held that the effects test

promulgated in the Secretary's regulations should be applied to private plaintiffs' claims for prospective relief under Section 504.

Once the petition's mistaken characterization of the Court of Appeals' ruling is corrected, the spectre conjured by the petitioners disappears. The decision does not create a whole new source of litigation that will wreak havoc with the State's budgetary decisions. This point is amply illustrated in cases cited in the certiorari petition itself. In both NAACP v. The Medical Center, Inc., supra, 657 F.2d 1322 and Bryan v. Koch, 627 F.2d 612 (2nd Cir., 1980) plaintiffs challenged the relocation or closure of hospitals on the grounds that the curtailment of care rendered by those facilities would have an adverse disparate impact on minorities and/or the handicapped. In both cases, the plaintiffs succeeded in proving a disparate impact on a protected group. In each case the court assumed that such proof was sufficient to establish a prima facie case, and that consideration of other potentially less onerous alternatives was therefore appropriate. Yet in both cases the plaintiffs ultimately lost because the defendants succeeded in showing that their selection of the apparently discriminatory alternative was justified. In short, the broad impact which the petitioners attribute to the Sixth Circuit's ruling has failed to materialize in the wake of similar rulings by other courts.

CONCLUSION

For the foregoing reasons, the respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

LEGAL SERVICES OF MIDDLE TENNESSEE, INC.

G. Gordon Bonnyman, Jr.
Susan Garner
404 James Robertson Pkwy., Suite 1512
Nashville, Tennessee 37219
(615) 244-6610

RURAL LEGAL SERVICES OF TENNESSEE, INC.
Bryan Paddock
Arcade Building, Courthouse Square
Cookeville, TN 38501
(615) 528-7436

Attorneys for Respondents

CERTIFICATE OF SERVICE

I certify that on this 30th day of November, 1983, a copy of Respondents' Brief in Opposition was served on counsel for all parties required to be served by depositing same in a United States mailbox, with first class postage prepaid, addressed to William B. Hubbard, Chief Deputy Attorney General, State of Tennessee, 450 James Robertson Parkway, Nashville, TN 37219.

G. Gordon Bonnyman, Jr.